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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 964

LAWRENCE CAPITOL INC.,
PETITIONER,
v.
STANLEY-WARNER CORPORATION *et al.*,
RESPONDENTS.

BRIEF OF ESSEX SAVINGS BANK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Opinion Below

While the United States Court of Appeals for the First Circuit did not render an opinion in dismissing petitioner's appeal for want of diligent prosecution, there was an opinion in another aspect of this lengthy litigation, *Lawrence Capitol, Inc. v. Stanley-Warner Corporation, et al.*, 152 F. Supp. 889 (D.C., Mass., 1957), affirmed 254 F.2d 814 (1st Cir., 1958) and there was an opinion by the District Judge in directing the verdict from which plaintiff appealed resulting in the order of dismissal of January 3,

1963, *Lawrence Capitol, Inc. v. Standard-Warner Corporation, et al.* 206 F. Supp. 617 (D.C., Mass., 1962).

Questions Presented for Review

The sole issue in the petition is whether a United States Court of Appeals can dismiss an appeal for violation of the rules and orders of court in a case eight years old and under circumstances in which appellant was given every reasonable opportunity to perfect its appeal but instead chose to ignore both the Court's rules and orders.

Statement of the Case

Petitioner commenced this action on November 3, 1954, naming the Essex Savings Bank as one of a number of defendants. On April 15, 1955, petitioner started another action against many of the same defendants in the 1954 case but not the Essex Savings Bank. The two actions were consolidated for trial.

A separate issue in the cases was tried to a judge resulting in findings against petitioner, 152 F. Supp. 889, and this was affirmed per curiam, 254 F.2d 814. The balance of the case was tried before a jury commencing May 21, 1962. The trial lasted thirteen days and at the end of the trial the District Judge directed a verdict for all defendants, 206 F. Supp. 617, and judgment of dismissal entered June 12, 1962. Petitioner filed its notice of appeal on July 9, 1962 and secured and filed the complete transcript with the Clerk of the United States District Court on August 16, 1962.

Then started a series of inexplicable delays and violations of court rules and orders.

Although the stenographic record was filed on August 16, 1962 with the Clerk of the District Court, petitioner

did not undertake to see to it that the record and transcript were transmitted to the Clerk of the Court of Appeals until October 15, 1962.

Petitioner on October 25, 1962 filed a motion requesting an extension of time to file a statement of points on appeal, a statement of the parts of the record it proposed to print, and its brief and record appendix. The Court of Appeals by order dated October 25, 1962 required that the statement of points and designation of parts of the record to be printed be filed by November 5, 1962 and the brief and record appendix by December 31, 1962.

The statement of points was filed on November 5, 1962, but petitioner at no time filed the designation of parts of the record to be printed. It was apparent, however, that petitioner at all times considered printing part of the record in its record appendix because all motions requested time extension for filing the record appendix. Thus the designation of parts of the record was an essential step to perfect the appeal and by November 5, 1962 petitioner was already in default.

On December 26, 1962, petitioner, apparently overlooking the fact it was already in default, filed a motion to extend the time to file its brief and record appendix until January 31, 1963. Petitioner did not have this motion allowed by December 31, 1962.

When the Clerk's office of the Court of Appeals inquired of petitioner as to the number of pages of its brief and record appendix that had been printed since it received the transcript on August 16, 1962, petitioner shocked both the Court and counsel by filing on January 3, 1963 a hand written motion for leave to file a typewritten brief and record appendix. No affidavit or other substantiation was filed with this motion.

The motion to use typewritten brief and record appendix demonstrated that other than filing the notice of appeal,

transcript and motion to extend time, petitioner in the period from June 12, 1962 until January 3, 1963 had done *absolutely nothing* to perfect its appeal. Its motions misled both the Court and counsel for appellees into thinking that petitioner was diligently submitting material to the printer and that the brief and record appendix were nearing completion.

There was no need for counsel for the appellees to file briefs in opposition to the motion for an extension on January 3, 1963. It was obvious by then that petitioner was not prosecuting the appeal with diligence. The Court of Appeals on the same date dismissed the appeal for want of diligent prosecution.

The Court did, however, stay its mandate until January 24, 1963. In the interim petitioner still did not file its designation of parts of the record to be printed. Instead petitioner sought to file a "brief" of about 30 pages which contained numerous references to the typewritten transcript but none to any record appendix. The "brief" was totally in violation of all requirements of the rules of the Court of Appeals for the First Circuit.

Petitioner was not incapable of taking the proper steps to perfect its appeal. It had already done so in an earlier appeal in this case. 254 F.2d 814. This time petitioner seemed content to fail into default, remain in default, violate court orders and rules, and when the Court called petitioner on its violations, barrage the Court with numerous motions.

Argument

This action has been pending against this respondent for eight years. Petitioner has had two separate trials before two different Federal Judges. Both ruled that petitioner's claims were devoid of merit.

The Essex Savings Bank is a Massachusetts savings bank with depositors, both large and small, numbering over 30,000 in the greater Lawrence, Massachusetts area. This litigation against the bank, so frivolous and without foundation, has been a constant drain on depositor's funds. Litigation must end sometime. Court rules are designed to require a litigant to take certain specific steps on appeal or else end the litigation.

Petitioner had every opportunity to perfect its appeal. Instead it went into default on November 5, 1962 and again on December 31, 1962. There is no reason why respondent should wait around year in and year out, while its witnesses are lost to it, as petitioner patches together an appeal.

Petitioner suggests in its petition that the designation of parts of the record to be printed was not necessary because none of the record was "essential". This is simply nonsensical. The statement of points filed by petitioner, among other things, challenged the District Court's action directing a verdict. The Court of Appeals could not properly rule on this point without the bulk of the testimony before it.

Petitioner also suggests that because respondents did not file briefs in opposition to its motion of December 26, 1962 to extend the time to file its brief and record appendix until January 31, 1963, respondents did not object to the motion. This respondent assumed on December 26, 1962 that by that time petitioner had printed the bulk of the record. When petitioner filed its motion on January 3, 1963 to use a typewritten record, it was apparent to this respondent, as it was to the Court of Appeals, that petitioner was simply dragging this interminable litigation further out.

The petition for a writ of certiorari relates to a purely intra-circuit affair. Certainly this Court should not be burdened with review of cases where an unsuccessful litigant was eminently successful in violating court rules and

orders. To review this case would make court rules meaningless. If every litigant who is defaulted or whose action is dismissed can have review of the Court's action in this court, then there will be little certainty to court rules. And if the action were reviewed, what standard instead of court rules shall be used? Should the Court permit violations of the rules and orders of a court as long as the appellant does not dilly-dally more than the 80 days that petitioner says elapsed here?

Conclusion

For the foregoing reasons, respondent Essex Savings Bank respectfully requests that the petitioner be denied.

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